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Attorneys for Objector, Kirk Fyson

IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAMES C. KANG, an individual,
 MICHAEL MOSES, and individual, et. al.
 on behalf of themselves and all others
 similarly situated,

Plaintiffs,

v.

WELLS FARGO BANK, N.A.; and DOES
 1 through 10, inclusive,

Defendant

Case No.: 5:17-cv-06220-BLF
 Case No. 5:21-cv-00071-BLF

**OBJECTOR'S REPLY MEMORANDUM IN
 SUPPORT OF OBJECTOR FYSON'S
 MOTION FOR ATTORNEY'S FEES AND
 SERVICE PAYMENT**

1		
2	PATRICIA BARRERAS, an individual, JACQUELINE F. IBARRA, an individual, 3 et. al.,	
4	Plaintiffs,	Judge: Hon. Beth Labson Freeman Ctrm: 3
5	v.	Date: September 15, 2021 Time: 9:00 a.m.
6		
7	WELLS FARGO BANK, N.A., and DOES 1 through 10 inclusive,	
8		
9	Defendant.	

10
11 **OBJECTORS'S REPLY MEMORANDUM IN SUPPORT OF OBJECTOR FYSON'S**
12 **MOTION FOR ATTORNEY'S FEES AND SERVICE PAYMENT**
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1 **I. INTRODUCTION**

2 Plaintiffs argue that Fyson’s request should be denied because: (1) his objections did not benefit
3 the class and (2) as an objector, Fyson may not be awarded fees as a percentage of the benefit he conferred,
4 but only may be provided a reasonable lodestar.

5 Plaintiffs are incorrect. First, because Fyson only seeks fees for a percentage of the financial
6 benefit his objections provided to the class, *if* Plaintiffs’ incorrect argument that Fyson provided no benefit
7 were accepted, then Fyson’s request for a percentage of the benefit would result in *less* fees than lodestar.
8 Nevertheless, his objections directly increased the classes’ recovery because his objections caused Class
9 Counsel to reduce its fee request by nearly \$8 million. And as a result of Fyson’s objections, Class Counsel
10 has waived any appeal of the Court’s fee award, which is \$10.8 million less than requested in late May of
11 2021, immediately prior to Fyson’s objections.

12 **II. LEGAL ARGUMENT**

13 **A. Fyson’s objections caused Plaintiffs’ waiver of more than \$8 million in requested fees.**

14 Plaintiffs and Fyson agree the Court should award Fyson fees only upon finding his objections
15 benefitted this class. Plaintiffs also agree under the catalyst theory doctrine, Fyson may claim credit for
16 Class Counsel’s waiver of fees *if* such waiver occurred because of Fyson’s objections. Opp. 2:10-2:19
17 (ECF 150); *see also Barnes v. AT&T Pension Benefit Plan - Nonbargained Program*, 963 F. Supp. 2d
18 950, 963 (N.D. Cal. 2013) (The catalyst theory “posits that, for purposes of determining an award of
19 attorneys’ fees, a [party] prevails if he achieves the desired outcome of litigation even if it results from a
20 voluntary change...”). Thus, the Parties agree the Court should decide whether Fyson’s objections caused
21 Class Counsel to waive \$8 million in requested fees, and second, whether that waiver benefitted the Class.

22 Plaintiffs argue that Fyson’s objections did not cause Class Counsel to reduce their fee request.
23 Opp. 2:10-2:14. The timing of the concession demonstrates that even if Fyson’s objections were not the
24 sole consideration for Class Counsel’s waiver of \$7,958,677 in fees, they were the proverbial “straw that
25 broke the camel’s back” which finally caused Class Counsel to reduce their fee request. Specifically,
26 following the March 2021 preliminary approval hearing, the Parties modified the settlement agreement,
27 but Class Counsel continued to seek \$31.8 million in fees. (ECF 109, ¶37). The notice to the class—
28 finalized *after* the preliminary approval hearing and mailed over a month after the hearing—also stated

1 Class Counsel would seek \$31.8 million in fees. *Id.* at 38. Finally, Class Counsel’s motion for fees, filed
 2 in late May of 2021, continued to seek and argue for \$31.8 million in fees *despite* the Court’s concerns
 3 voiced at the preliminary approval hearing. (ECF 114, 24:27-24:28). Only *after* Fyson filed his
 4 objections in June of 2021, and *only* in Plaintiffs’ opposition to Fyson’s objections, did Class Counsel
 5 modify its fee request, and thereby waive any ability to recover fees of \$7,958,677. Thus, Plaintiffs’
 6 argument that Fyson was not the reason they reduced their fee request is belied by the clear record.

7 Moreover, Fyson has not requested fees based on the full \$8 million fee reduction of Class Counsel,
 8 but instead only on **one-third** of such reduction. In so doing, Fyson seeks the Court recognize his
 9 objections were a significant cause—though not necessarily the sole cause—of the fee reduction. Even if
 10 the Court finds the fee reduction occurred both because of the Court’s statements during the preliminary
 11 approval hearing *and* Fyson’s objections, Fyson’s objections were still a necessary cause of the reduction
 12 (as evidenced by Class Counsel’s consistent requests for one-third until responding to Fyson’s objections),
 13 and his objections were thus a catalyst in obtaining that reduction.

14 Class Counsel further argues Fyson’s objections made no difference because the Court would have
 15 awarded the same fee regardless of Class Counsel’s fee waiver of \$7,958,677. Plaintiffs’ assertion is
 16 purely hypothetical and misses the mark. The settlement agreement explicitly authorized Class Counsel
 17 to appeal any fee award—as they previously had done—and to withhold distribution pending the appeal.
 18 Fyson’s efforts rendered the \$7,958,677 fee reduction beyond appeal, a significant benefit to the Class
 19 regardless of how the Court might have ruled in the absence of such waiver.

20 Thus, Fyson respectfully requests the Court find his objections resulted in a fee reduction – and
 21 gain to the Class distribution - benefitting the Class at least \$2,652,892, *i.e.*, one third of the waived fees.

22 **B. The Court should award fees as a percentage of the benefit Fyson caused.**

23 Fyson’s fee request is reasonable. As Fyson explained in his moving papers, Objectors who
 24 provide a financial benefit to class members are entitled “to fees on the same equitable principles as class
 25 counsel.” *Rodriguez v. Disner*, 688 F.3d 645, 658-59 (9th Cir. 2012). Though Class Counsel objects to
 26 awarding Objector Counsel fees under percentage-of-the-benefit doctrine (versus lodestar), neither case
 27 cited by Plaintiffs is contrary to Fyson’s authority that the percentage method is preferable where an
 28 objector’s efforts results in a quantifiable benefit to the class. *See Opp.* at 4:26-4:27, citing *In re Riverstone*

1 *Networks, Inc.*, 256 Fed. Appx. 168 (9th Cir. 2007) (holding that in awarding *lodestar*, court’s finding that
 2 risk multiplier was not appropriate was not an abuse) and *In re Homestore.com, Inc.*, 2004 U.S. Dist.
 3 LEXIS 25234 (C.D. Cal. 2004) (objector requested and was awarded fees based on *lodestar* where
 4 objection did not increase financial recovery of class; no justification provided for multiplier on *lodestar*
 5 award); *see also In re Optical Disk Drive Prods. Antitrust Litig.*, 2021 U.S. Dist. LEXIS 171405, at *24
 6 (“Were [objector] seeking fees on a *lodestar* basis, the showing indeed would be insufficient. As noted,
 7 however, he requests a percentage-based fee award. Because [objector’s] efforts resulted in a readily
 8 quantifiable benefit to the class... the percentage method is appropriate.”)

9 As to the *lodestar* calculation, Plaintiffs do not object to the reasonableness of Objector Counsel’s
 10 hourly rates; they solely object to the number of hours expended. As this Court is aware, this is a highly
 11 complicated case with a complex history. Objector Counsel, like any counsel hired after substantial
 12 litigation, necessarily spent significant time learning the entire file, which ensured Fyson’s objections
 13 would be impactful and benefit Fyson and the class. As stated in the final approval order: “Mr. Fyson’s
 14 counsel participated fully in [both final approval hearings]... All counsel were exceptionally well-prepared
 15 and the oral argument was of great assistance to the Court...” (ECF 145 at 8:13-8:16).

16 Nevertheless, Objector Counsel does not seek payment based on *lodestar*—the *lodestar* is provided
 17 only to demonstrate the reasonableness of the percentage recovery. Even if the *lodestar* were reduced to
 18 \$145,909¹--a reduction of 40%--the *lodestar* crosscheck would yield a 4x multiplier, and it would not
 19 affect the reasonableness of the Objector’s requested fee.

20 **C. Fyson should be awarded a service payment.**

21 Plaintiffs argue awarding Fyson service payment would encourage “meritless objections.” Opp. at
 22 5:28. The Court found that Fyson assisted the Court. (ECF 145 at 2:1-2:3). Most importantly, in direct
 23 response to Fyson’s objections, Class Counsel waived \$8 million in requested fees. Finally, as Objector
 24 Counsel has requested the Court to reduce their fee award by the amount of the service payment, Fyson’s
 25 service payment will not reduce the class distribution. For the reasons provided, Fyson respectfully
 26 requests the Court award the requested fees and \$3,500 service payment.

27 _____
 28 ¹ Fyson included 266.1 hours in his calculated *lodestar*, after removing 189 hours (42% of all hours worked by his counsel)
 from counsel’s timesheets, resulting in a *lodestar* of \$241,932, resulting in a *lodestar* crosscheck multiplier of 2.41.

Respectfully submitted,

Dated: January 11, 2022 /s Justin L. Swidler

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